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No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1929

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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OPINION BELOW

No opinion was written by the Supreme Court of the District of Columbia. (R. 31.)

The opinion of the Court of Appeals (R. 34) is reported in 30 F. (2d) 742.

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1929. (R. 43.) Petition for certiorari was filed April 5, 1929, and granted May 13, 1929. (R. 44.) The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether, on the record in this case, mandamus lies against the Secretary of the Interior to compel him to execute and deliver to respondent a patent in fee to the land herein involved; and

(2) Whether upon default by a locator of an oil-shale placer mining claim in the performance of annual assessment work required for the year 1920, under Section 2324 of the Revised Statutes, Section 37 of the Mineral Leasing Act of February 25, 1920, saves to such defaulting locator any right to resume possession of said claim after such default and perform assessment work thereon to the extent necessary under the general mining laws to entitle a locator to a patent.

STATUTES INVOLVED

The relevant provisions of the statutes involved are:

Section 37 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C. Title 30, Section 193):

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal-mining op-

> erations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.* (Italics ours.)

Section 2324, Revised Statutes (U. S. C. Title 30, Section 28):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Section 2325, Revised Statutes (U. S. C. Title 30, Section 29), provides the procedure for obtaining a patent when—

> * * * five hundred dollars' worth of labor has been expended or improvements made upon the claim * * *

by the locator.

STATEMENT

On March 30, 1928, respondent, as plaintiff, filed in the Supreme Court of the District of Columbia his petition for a writ of mandamus against a predecessor in office of petitioner as Secretary of the Interior, in order to compel the issuance by the said Secretary of the Interior of a patent to certain oil shale land in Garfield County, Colorado, described as the north half of the north half of section twelve in township five south, of range ninety-six west of the sixth principal meridian. (R. 1–5.) Rule to show cause was issued and Hubert Work, then Secretary of the Interior, filed his response thereto. (R. 30–31.) After hearing of the response, the court discharged the rule to show cause and dismissed the petition. (R. 31.) On January 7, 1929, this judgment was reversed by the Court of Appeals of the District of Columbia and the case remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of the said Court of Appeals. (R. 43.)

The petition for the writ of mandamus alleges that on October 1, 1919, the plaintiff and seven other citizens of the United States, each qualified under the law in relation thereto to locate placer mining claims, located the said north half of the north half of section twelve in township five south, of range ninety-six west, as the Spad No. 3 placer claim; that at the time of such location the said land was

a part of the public lands of the United States subject to appropriation under the mining laws of the United States for the valuable deposits of oil shale therein and not otherwise appropriated or reserved under the laws of the United States. (R. 1.) The Spad No. 3 was one of a group of six claims known as Spad placer claims Nos. 1 to 6, inclusive, adjacent to each other and all owned by plaintiff and his associates. The plaintiff and his colocators performed on the Spad placer claims Nos. 4, 5, and 6 annual labor of the total value of more than $600 for the assessment year 1920, ending June 30, 1921, intending, so it is averred, such labor to be for the entire group of six claims. (R. 1, 2.) Thereafter the plaintiff acquired the interest of his colocators in Spad claim No. 3, and during the assessment year 1921, ending June 30, 1922, performed labor and made improvements on the Spad No. 3 claim of the value of more than $100, further expenditures being made in labor and improvement thereafter upon Spad No. 3 claim of the required amount of $100 annually until the total aggregate value of such labor and improvement exceeded the sum of $500. (R. 2.) On September 25, 1922, plaintiff applied for a patent to the Spad placer claim No. 3. No other person had attempted to make location of this placer claim, and no contest or claim adverse to the plaintiff's claim had been instituted by anyone, except that after he had filed his application for patent adverse proceedings were instituted by

the Commissioner of the General Land Office before the district register and receiver. On hearing of the contest proceedings, all of the charges against the claim were either withdrawn or else dismissed, except a charge alleging the insufficiency of the annual labor for the assessment year 1920. (R. 2, 3.) On review of the record of proceedings, the Commissioner of the General Land Office held the claim to be null and void for the reason that the annual labor was insufficient for the assessment year 1920. This holding was approved by the Secretary of the Interior in a decision rendered October 3, 1927. (R. 3, 4.)

The opinion of the Secretary, which is made a part of the plaintiff's petition, holds that improvements on Spad claims 4, 5, and 6 had "not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown that they were made in furtherance or are a part of a general scheme to develop the claims as a group" (R. 17, 18); that "in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals specified in said act and unperfected at the date thereof by a certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the

leasing act" (R. 8). The Secretary determined that the claimants were in default as to performance of assessment work on the Spad placer claim No. 3 for the year 1920, and that the claim thereby lapsed and that the resumption of work thereafter would not restore a lost estate. (R. 9.)

The plaintiff then applied to the Secretary for a rehearing, which was allowed. On February 8, 1928, the Secretary affirmed his previous decision. The second opinion, also made a part of plaintiff's petition, is to be found at pages 18–29 of the Record. Therein the Secretary, although conceding that the Spad No. 3 claim appeared to be a valid existing claim on February 25, 1920, the date the Leasing Act became effective, adverted to the admission of plaintiff that no work had been done or improvement made on that claim prior to July 1, 1921, and to his insistence that the assessment work performed during the assessment year 1920 on the adjacent claims of the group was properly creditable as acceptable expenditure for the Spad No. 3 claim for 1920 (R. 19), and refused to disturb his previous finding that such work was not performed with any intent that it was to be a part of any general scheme of development of the claims as a group (R. 20). With respect to the right of resumption of work after a default in its performance subsequent to the passage of the Leasing Act, the Department held that in view of the provisions of Section 37 thereof—

> When the original locators failed to maintain the claim by doing the annual assessment work within the period prescribed by law, all their rights *against the Government* in and to this location upon oil-shale lands were extinguished, and this claimant, who acquired the outstanding interest of the other locators and proceeded thereafter to reenter and perform work on the land that was no longer subject to the general mining laws, was no more than a trespasser, and could neither revive nor initiate any rights to the land thereby. (R. 22.) (Italics ours.)

The Secretary of the Interior, in answer to plaintiff's petition, alleged—

(1) That the plaintiff, with the aid of counsel, has been afforded a fair and complete hearing; that as disclosed by plaintiff's petition the decision reached by him was not the result of arbitrary or capricious action, and that it is final, and not reviewable or subject to review or modification by any court. (R. 30.)

(2) The plaintiff's petition discloses that he has failed to maintain his original right to the claim in question in having omitted to perform the necessary labor at the time provided by law, thereby causing the claim to lapse; that in such circumstances the Leasing Act of February 25, 1920, prevented the plaintiff from thereafter reviving and reinstating his original lapsed claim; in effect withdrew the land from operation of the mining laws

under which the claim had been initiated and placed it entirely and wholly under the provisions of the Leasing Act of 1920. (R. 30–31.)

SPECIFICATION OF ERRORS TO BE URGED

I. The Court of Appeals erred in reversing with costs the judgment of the Supreme Court of the District of Columbia in this cause and, in effect, directing that a writ of mandamus should issue against the Secretary of the Interior.

II. The Court of Appeals erred in holding that Section 37 of the Mineral Leasing Act of 1920 did not supersede Sections 2324 and 2325, Revised Statutes, and take away the right of the locator to resume work after he had defaulted in annual assessment work.

III. The Court of Appeals erred in holding that, under the excepting clause of Section 37 of the Mineral Leasing Act of February 25, 1920, the plaintiff had a valid claim to the land in question at the date of the passage of that Act and that it was thereafter maintained by him in compliance with the laws under which the claim was initiated, thereby giving to him a vested right to a patent.

IV. The Court of Appeals erred in holding that Section 2324 did not restore the land to the public domain upon the happening of the default in annual assessment work and thereafter make it subject to disposition solely under the Leasing Act of 1920.

V. The Court of Appeals erred in holding that the United States is not the owner of the tract involved.

SUMMARY OF ARGUMENT

As to the question whether the facts exhibited present a case for mandamus of the Secretary of the Interior, compelling him to issue a patent to respondent, it is contended by petitioner that the Act of February 25, 1920, radically changed the law as to the mode of disposition of oil shale and other mineral deposits belonging to the United States and mentioned in the first section thereof; that Section 37 of said Act prescribed the conditions under which a mining claim theretofore initiated under the mining laws for such deposits is excepted from the operation of said Act and may be perfected and patented; that as the application of respondent is one for a patent to the claim under the general mining law, the Secretary of the Interior, in determining whether such claim is one that may be patented, must necessarily ascertain whether the facts presented in such application bring the claim within the exceptions of Section 37; that as Section 37 excepts only "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery," these provisions require interpretation and construction as to their meaning and effect and involve the exercise of judgment and

discretion on the part of the Secretary; that such judgment and discretion exercised in denying the patent to respondent was not arbitrary or capricious or beyond the scope of the authority of the Secretary, but on the contrary is in accord with previous rulings and regulations of the Department of the Interior and not in conflict with any decision of this Court; that the decision did not disturb vested rights of the respondent. For the reasons stated, the decision of the Secretary, rejecting the application of respondent and declaring his claim null and void, is not reviewable on a direct proceeding by mandamus.

The default of the locators in not performing the required annual assessment work on the Spad No. 3 claim for the assessment year 1920, terminated the rights of the claimants thereof by operation of law; the privilege of resumption of work by the claimants or their successor in interest was cut off by the Leasing Act. The action of the Secretary of the Interior was therefore correct in denying the respondent's application for a patent to the Spad No. 3 claim, and in declaring the claim null and void. The privilege of relocation accorded by Section 2324, Revised Statutes, is irreconcilable with the provisions of Section 37 of the Leasing Act, and was consequently withdrawn; and so also was the privilege of resumption of work by a defaulting locator, for the legal effect of resumption of work is to reinstate a lost right of possession, unless the

privilege of resumption was saved by the exceptions in Section 37 thereof. The privilege of resumption was not saved, because the obligation to *maintain* the claim therein prescribed refers primarily to the mandatory statutory duty laid upon the locator to perform the annual assessment work in the manner and within the periods prescribed. The mining law protected the right to the possession of a claim validated by discovery so long as the annual assessment work was kept up; it likewise protected the *pedis possessio* of a claimant in search for minerals so long as his actual possession and search was kept up against forcible, fraudulent, and clandestine intrusions of others.

To construe Section 37 as saving the privilege of resumption of work after default, would be to disregard the spirit and intent of the Leasing Act, as it would greatly extend the privileges afforded a defaulting locator under the mining law by rendering his claim immune from successful assault by either private claimant or by the Government, except upon establishment of an intent to abandon the claim no matter how delinquent the locator had been in the performance of assessment work. It would recognize a superior right of a defaulting locator over strangers who might desire to locate the claim, while the mining law made the superior right depend, where default occurred, upon priority of possession for the purpose of mineral development. It would render the Leasing Act difficult if not impossible of proper and successful

administration as to oil shale, due to the uncertainty as to what lands were subject to its operation, and would be prejudicial to the public interest by transferring the title of all oil shale lands, where the essential acts of mere location had been performed, to private parties and thus deprive the Government of contemplated rents and royalties from operations under the Leasing Act. No declaration or adjudication of forfeiture is necessary; the claim upon breach of the condition necessary to maintain the possessory right *ipso facto* ceases to exist.

ARGUMENT

I

MANDAMUS IS NOT A PROPER REMEDY

The writ of mandamus does not lie, because the Secretary of the Interior in denying the respondent a patent (1) acted within the scope of his authority; and (2) his action was neither arbitrary nor capricious, for (*a*) it was in harmony with previous decisions and regulations of the Department of the Interior governing the same state of facts, and with the decisions of the courts, and (*b*) it disturbed no vested rights of the respondent.

(1) The Secretary acted within the scope of his authority when he held that the failure of the locators of the Spad No. 3 claim to perform the annual assessment work required by Section 2324, Revised Statutes, for the year 1920, terminated the rights of the respondent under the provisions of Section 37 of the Leasing Act of

February 25, 1920. That Act established an entirely new policy in its mode of disposition of oil shale and certain other mineral deposits upon the public lands. Prior to its passage, under the general mining laws, a citizen had the right to enter at will upon the unoccupied public domain, make a discovery and location and take therefrom the ores without rendering any account to the Government, and, at his option, upon the expenditure of a specified sum in labor or improvement, obtain a patent for the land at a nominal price per acre. Under the Leasing Act, exploitation is permitted only by leasing the land, the lessee being required to pay rents and royalties to the Government. Under Section 37 of said Act, such mode of disposition is exclusive, "except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

After the Leasing Act was passed, respondent sought a patent under the mining laws for land containing oil shale deposits. His application was not entitled to consideration unless saved by the exception in Section 37. *Work* v. *Braffet*, 276 U. S. 560, 564.

It was established to the satisfaction of the Secretary in the proceedings before him, challenging the validity of the claim, in which respondent was given full opportunity to be heard, that no assessment work was performed on or for the benefit of

the Spad No. 3 claim for the assessment year 1920. Thereby, there was presented to the Secretary the question whether the claim had been "maintained in compliance with the laws under which initiated."

Under Section 37, the preexisting authority of the Secretary to issue patents under the mining laws was circumscribed as to oil shale claims. That section by necessary implication imposed an additional specific duty upon the Secretary to inquire and determine whether the claim was one that had been maintained after the passage of the Leasing Act in compliance with the mining laws. Such maintenance was a condition of the exception. This was an inquiry that theretofore had been held of no concern to the Government and to involve a question solely arising in controversies between rival claimants and exclusively within the jurisdiction of the courts; Lindley on Mines (3d Ed.) Vol. 2, p. 1531, and cases there cited; General Mining Regulations of March 29, 1909, Par. 55 (37 L. D. 769); *Barklage* v. *Russell,* 29 L. D. 401, 402; *In re Wolenberg,* 29 L. D. 302, 304; *Marburg Lode Mining Claim,* 30 L. D. 202, 208, except where the claim involved was within the limits of a subsequent withdrawal or reservation for public purposes; Instructions of January 13, 1904, 32 L. D. 387; *E. C. Kinney,* 44 L. D. 580; *Interstate Oil Corporation and Frank O. Chittenden,* 50 L. D. 262. There was thus conferred upon the Secretary the authority to

inquire as to the continued maintenance of the possessory right to the claim. He could not well determine this inquiry without construing Section 37 as to what was meant by "thereafter maintained in compliance with the laws under which initiated." This Court has repeatedly held that where by the terms of an Act, the Secretary is required, upon application of the claimant, to issue a patent or other certificate of title, Congress by implication confers upon the Secretary power to make all determinations *of law* as well as of fact which are essential to the performance of the duty specifically imposed. In making such determinations "he acts as a special tribunal with judicial functions." See *West* v. *Standard Oil Co.*, 278 U. S. 200, 218–220, and cases there cited. Section 37 was in need of construction to determine its purpose. This Court in *Work* v. *Braffet, supra,* plainly intimated that this section was in need of construction by resort to extrinsic sources of information, for, on page 566, it said:

> The reference in Section 37 to valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery" at least suggests that they embrace only such substantial claims as would on compliance with the provisions of the *former* law ripen into ownership; such claims as might be acquired under the mining laws by location, possession and development which, if continued to discovery and entry, would entitle the claimant to a patent.

That such was the purpose is established by the Congressional debates. 56 Cong. Rec. pt. 5, pp. 4577–4585, 66 Cong., 1st sess. (Italics ours.)

The construction of the Act by the Secretary involved the exercise of judgment and discretion, the exercise of judicial functions. The saving clause of Section 37 is in general terms; it does not definitely or clearly state the specific facts and circumstances under which a claim would be saved under its provisions. As a prerequisite to the issuance of a patent the Secretary must determine a question of law—namely, what acts constitute maintenance in compliance with the laws under which the claim was initiated; or putting it concretely with reference to the instant case: Was a valid claim, existent on February 25, 1920, "thereafter maintained in compliance with the laws under which initiated," within the import of that language and the intention of Congress, if the claimant failed to make any improvements or do any work on such claim before July 1, 1921, but did later perform sufficient work to entitle him to a patent, if his prior default did not, under Section 37, terminate his claim? That the Secretary's construction of the statute was not only a reasonable construction, but one impelled by its terms, will hereinafter be argued in the discussion as to whether he erred in its construction. In resistance to the writ of mandamus it is believed sufficient to show that the de-

cision of the Secretary was not in apparent defiance of law, nor arbitrary or capricious, but within the scope of the administrative duty confided to him. *Hall* v. *Payne,* 254 U. S. 343, 347; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325; *Ness* v. *Fisher,* 223 U. S. 683, 692–694; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40; *United States ex rel. Miller* v. *Raum,* 135 U. S. 200.

(2) (*a*) The decision was not arbitrary or capricious, for the decision of the Secretary was in accord with previous rulings of the Department. It had been held that a mining claim as to which claimant was in default in the performance of annual assessment work at the date of the withdrawal for the construction of irrigation works under the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, does not except the land from the force and effect of the withdrawal, *E. C. Kinney, supra;* that a withdrawal under the Act of June 25, 1910, c. 421, 36 Stat. 847, is in the nature of a continuing withdrawal, which, although not attaching to land which at the date of the withdrawal was within a valid existing oil placer mining claim, attaches immediately upon the default of the claimant in the performance of assessment work, and although there had been an expenditure of more than the law required as a prerequisite to the grant of a patent, the application for patent must be denied. *Interstate Oil Corporation and Frank O. Chittenden, supra.* In the case

of *Cronberg* v. *Hazlett*, 51 L. D. 101, being the first case involving the construction of Section 37 in its bearings on default in the performance of assessment work on a mining claim, it was held that an oil and gas mining location, unperfected at the date of the Leasing Act, can not be perfected pursuant to the excepting clause in Section 37 of that Act, unless the requirements of Section 2324, Revised Statutes, relating to the performance of annual assessment work are thereafter fulfilled. Also, in the reprint of the mining regulations subsequent to the passage of the Leasing Act, there is affixed this headnote (49 L. D. 58):

> In view of the repealing provisions of the potash act of October 2, 1917 (40 Stat. 297), and the leasing act of February 25, 1920 (41 Stat. 437), the following regulations are not applicable to deposits of potash, oil, oil shale, gas, phosphate or sodium, except as to valid claims existent at date of such repeal and thereafter duly maintained pursuant to the law under which located.

This shows a clear recognition by the Department of the limitations of the applicability of such regulations to claims for the deposits enumerated in the headnote.

We do not find any reported decision of the courts prior to the rendition of the decision by the Secretary with respect to the claim here involved where consideration was given to the effect of the failure to perform annual assessment work subsequent to the passage of the Leasing Act on

mining claims located for the minerals within the purview of that Act. The case of *Hodgson* v. *Midwest Oil Co.*, 17 F. (2d) 71, decided by the Circuit Court of Appeals, Eighth Circuit, is in line with the above-stated views of the Department, as to the effect of such failure on oil placer claims which before such failure were embraced in a petroleum withdrawal. In that case the action was one in ejectment. The defendant demurred to the petition. The court adverted to the absence of a showing in the petition of performance of assessment work during the interval from January 1, 1921, to July 1, 1922, the period fixed for the doing of assessment work for 1921, and held that the implication was that no such work was performed in that year. It held the allegations of ouster by defendants during 1921 were not such as to constitute any justification for not doing the work in that year, stating (p. 77):

> Now, it seems to us clear that, if an adequate legal excuse for not doing the assessment work or making the improvements is not stated in the petition, then the plaintiff has failed to state a cause of action in ejectment, for it is well settled that a failure to do the work or have an adequate legal excuse automatically terminates the locator's right of possession, and in the instant case would have terminated before the commencement of the action.

Notwithstanding the opinion of the court below to the contrary, it is submitted that the vital

question in the *Hodgson Case* was whether it was essential for the plaintiff in order to show a possessory right that would sustain a complaint in ejectment to allege the continuous performance of assessment work to the date of hostile entry by a claimant under the Leasing Act, to prevent the petroleum withdrawal of 1909 from defeating his claim.

The decision of the Secretary in the case at bar can hardly be characterized as arbitrary or capricious when it was in accord with the four last-cited previous decisions, unless it had the effect of disturbing vested rights of the respondent, a question now to be discussed.

(2) (*b*) The Secretary's decision disturbed no vested right of respondent. Under the general mining law, apart from the change wrought by the Mineral Leasing Act of 1920, at the moment the locators of a claim were in default in the performance of assessment work, the land included therein became open public mineral lands of the United States subject to relocation and purchase by others. The exclusive right of possession and enjoyment of the locators *ipso facto* ceased to exist. It was contended by respondent in the court below (Brief, p. 42), "that the mere nonperformance of assessment work within the assessment year does not in and of itself *have any effect whatsoever* upon the mining claim on which such default in annual labor is made, but, on the contrary, that such mining claim *continues in all its original vigor* up to the instant of relocation by a third party; that it is the re-

location during the period of default, and not the mere default itself which terminates the *estate* of the original locator." (Italics ours.) These deductions as to the character of the locator's estate after default appear to be made from certain language used by this Court in the case of *Belk* v. *Meagher*, 104 U. S. 279, 283, and certain courts of the mining States in suits dealing with the rights of rival mining claimants to the same tract of land, and where the occurrence of the default by the original locator was considered solely from the standpoint of its effect in depriving him of his rights under the mining laws in favor of third parties, consideration of its effect upon his relations with the Government, the paramount proprietor of the land, not being involved.

We submit that respondent's theory as to the nature of the estate after default in the performance of assessment work, if by estate is meant the exclusive right of possession, is not sustained by the opinion in *Belk* v. *Meagher*, and is incompatible with numerous opinions of this Court and of other eminent authorities on the mining law. Furthermore, this theory would seem to involve the consequence that while the Government could after the default clothe a third party with the right to divest the locator's estate, it could not of itself by legislation directly divest it.

This Court in *Belk* v. *Meagher*, *supra*, p. 283, said:

> The language of the act is that the locators "shall have the exclusive right of possession

> and enjoyment of all the surface included within the lines of their locations," *which is to continue until there shall be a failure* to do the requisite amount of work *within the prescribed time.* (Italics ours.)

And again (p. 284):

> Mining claims are not open to relocation until the rights of a former locator have come to an end.

As to the character of the locator's rights prior to the occurrence of a default, the Court said:

> On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or preemption entry.

There is no room for a valid deduction from this opinion that the mere default had no effect on the locator's estate and that his right of possession was not terminated by the default.

The fallacy in the argument of the respondent is that he attributes the same dignity to the estate of the locator upon the happening of the default as it had before. The well-established doctrine that *after resumption* of work and before another enters, the rights of the locator stand as they would if no default had occurred is radically different from the contention made by respondent that *after default* the locator's rights stand as they were before,

until and unless another relocates. This contention makes the termination of the possessory right of the original locator dependent upon the act of a third party, whereas the possessory right terminates as a result of the delinquency of the original locator. As this Court stated in *Belk* v. *Meagher,* the land is not open to location until the rights of the original locator have come to an end. If it were otherwise, a relocation by another during the period of default would constitute a trespass. Manifestly, the contention that the construction of Section 37 by the Secretary would disturb vested or valuable property rights of respondent must be grounded on the proposition that a mere default of the original locators in the performance of assessment work effects no change in the character of the interest of the original locators in the claim, for the question here presented is not, what was the character of the interest of the locators before such default, nor what would be the character of the interest of the locators after resumption of work if the Leasing Act is put out of view, but what was the character of the interest of the locators under the general mining law when the default in the performance of annual labor occurred.

The answer is, the land was open public domain, subject to location and purchase under the mining laws by another; the possessory right of the original locators had come to an end and all that remained to them was the privilege of resuming work

before another entered and thereby the delinquency would be condoned, and the right of possession restored.

The proposition that the possessory right terminates upon the happening of the default has been repeatedly affirmed in an unbroken line of decisions by this Court and by eminent judicial authority in the mineral land States. We quote from but a few of those frequently cited.

In *Black* v. *Elkhorn Mining Company,* 163 U. S. 445, 450, this Court said:

> The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim. We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it.

And again:

> This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work * * *.

And again:

> If the locator remained in possession and failed to do the work provided for by statute his interest would terminate * * *.

This statement of the Court was quoted and approved in *Farrell* v. *Lockhart,* 210 U. S. 142, 148.

In *Union Oil Company* v. *Smith*, 249 U. S. 337, 349, this Court said:

> Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the annual labor required by Section 2324. *Belk* v. *Meagher*, 104 U. S. 279, 283, 284; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Farrell* v. *Lockhart*, 210 U. S. 142, 147; *Bradford* v. *Morrison*, 212 U. S. 389, 394.

The doing of "assessment work" was stated to be "the condition subsequent prescribed by Congress to be performed in order *to preserve the exclusive right to the possession of a valid mineral land location* upon which discovery had been made" (p. 350). (Italics ours.)

In *Cole* v. *Ralph*, 252 U. S. 286, 295, the Court said:

> A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and *so long as it is kept alive by performance of the required annual assessment work* prevents any adverse location of the land. (Italics ours.)

citing *Gwillim* v. *Donnellan*, 115 U. S. 45, 49; *Swanson* v. *Sears*, 224 U. S. 180.

In *Little Gunnell Co.* v. *Kimber*, 15 Fed. Cases, No. 8402, pages 629, 630, the court said:

> Although this work may not have been done within the time fixed by law, the original locator or claimant may resume work, *and thus regain his first estate,* at any time before another has taken possession of the property with intent to relocate it. (Italics ours.)

In *Swanson* v. *Kettler,* 17 Ida. 321, affirmed under the title of *Swanson* v. *Sears,* 224 U. S. 180, the court said (p. 336):

> If, however, such area in conflict became abandoned or forfeited under the Emma No. 2 location, it would not become a part of Independence No. 2, although within the surface boundaries thereof, *but would revert to the public domain* and would be subject to relocation by any one who desired to locate the same. The inchoate title and right of possession acquired by the senior locator *would revert to the United States, the owner of the fee,* by *operation of law;* and another claimant must acquire his rights from the owner of the fee. (Italics ours.)

In *Honaker* v. *Martin,* 11 Mont. 91, 97, the court said:

> Every person who continues in the possession of such property upon the public domain of the United States, without performing annually the labor that has been specified, violates the conditions of the grant from the government.

Cf. also Section 1 of the Act of July 2, 1898, c. 563, 30 Stat. 651.

At no time prior to the happening of such default had the locators any vested right of purchase or claim to a patent. The expenditures required by Section 2325, Revised Statutes, as a prerequisite to the grant of a patent had not been made. The rule is well settled that until the claimant does some act toward paying the purchase money he obtains no vested right of purchase or claim to a patent. *Benson Mining & Smelting Co.* v. *Alta Mining and Smelting Co.,* 145 U. S. 428; *Black* v. *Elkhorn Mining Co., supra.*

There could not be any serious question as to the authority of Congress to withdraw the permission to resume work and its offer to sell the land under well-settled rules of this Court. In *Cameron* v. *United States,* 252 U. S. 450, 460, the Court said:

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims.

As to claims made under the homestead and kindred laws it has been long settled that until the inchoate rights of such claimants become vested by the payment of the purchase money and perfection of all steps entitling them to a patent, title to the land is in the United States, and Congress can withdraw it from preemption and sale and dispose of it to another. *Frisbie* v. *Whitney,* 9 Wall.

187; *The Yosemite Valley Case,* 15 Wall. 77, 89, 91; *Shiver* v. *United States,* 159 U. S. 491; *Russian-American Packing Co.* v. *United States,* 199 U. S. 570, 577, 578. If then it is competent for Congress to cut off the rights of such claimants to their exclusive possession even though they had complied with the laws under which their claims had been initiated, *a fortiori,* Congress had power to cut off any rights of claimants under the mining law to resume work where they had defaulted in compliance with the applicable law and under such law had lost their right of possession.

No analogy is perceived between the facts in this case and those in *Roberts* v. *United States,* 176 U. S. 221, and *Ballinger* v. *United States ex rel. Frost,* 216 U. S. 240, cited by the Court of Appeals in this case. In the *Roberts case* an Act of Congress specifically directed the Treasurer of the United States to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether the certificates had been redeemed by him within the meaning of that Act. The certificates had been redeemed. The duty on the Treasurer was plain, imperative, and entirely ministerial. The Court distinguished the facts in that case from those in *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40, where the writ was refused because "the decision which was demanded from the Commissioner of Pensions required of him, in the

performance of his regular duties as commissioner, *the examination of several acts of Congress, their construction and the effect* which the latter acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act." (pp. 230, 231.) (Italics ours.) The duties imposed upon the Commissioner in the *Black case* are precisely of the same nature as those which were imposed upon the Secretary of the Interior upon the presentation of respondent's application for patent; that is, to examine the prior Acts of Congress, construe them, and determine the effect of Section 37 of the Leasing Act upon the previously enacted mining law. The rule in *Ballinger* v. *Frost, supra,* is also plainly inapposite. There the Secretary attempted to set aside the title of an Indian allottee that had become fixed and absolute as provided by the statute.

It is submitted that the construction placed upon Section 37 of the Leasing Act by the Secretary follows the settled rules as to rights of claimants under the mining law, and previous decisions of the Department as to the effect of the Leasing Act as well; that the latter Act conferred upon the Secretary jurisdiction to decide the questions of law involved as well as those of fact, and a writ of mandamus does not lie to review the correctness of his legal conclusions.

II

THE DECISION OF THE SECRETARY WAS CORRECT

The Secretary properly held that upon failure of the locators of the Spad No. 3 oil shale placer claim to perform the required annual assessment work for the assessment year 1920, all right of the locators in and to the claim terminated and the oil shale deposits therein became subject solely to disposition under the Leasing Act, and that the respondent, who is the successor in interest of the locators and the applicant for patent to the claim, by resuming work after such failure neither revived nor initiated any rights under the terms of Section 37 of said Act.

The Secretary properly construed the provisions of Section 37, because (1) he interpreted its language in accordance with its ordinary and well-understood meaning and legal effect, and (2) his construction was in harmony with the policy and purpose of the Act.

It would seem unnecessary to devote any space in this brief to an argument in support of the proposition that subsequent to the passage of the Leasing Act oil shale lands are not subject to relocation under the general mining law, were it not for the insistence of respondent that such proposition is untenable. (See Brief in opposition to the petition for certiorari, p. 7.) The Court of Appeals appears to concede the proposition but holds it has no effect on the right of the original locator to resume work. (R. 40–41.) We contend that it is manifest

from the provisions of Section 37 of the Act that not only are all relocations barred but the right of resumption of work which had the effect of a reinstatement of a lost right is also barred.

The provision in Section 2324, Revised Statutes, that "upon a failure to comply with these conditions [the conditions thereinabove prescribed relative to necessary acts of location and performance of annual labor], the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made" and the provisions of Section 37 of the Leasing Act declaring that oil shale and other minerals there mentioned "shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated" are so plainly repugnant to one another in terms as to render the former nugatory as to oil shale and other minerals affected by the latter. Clearly Section 37 withdrew the privilege of relocation. Under the former law although the original locator's rights failed, the permission given by the United States to locate and purchase remained. Under the present law that permission has been withdrawn. Under well-settled rules a relocation transfers no former rights of the prior locator; it initiates a new right, a new grant from the paramount proprietor, the United States. In *Lavagnino* v. *Uhlig,* 198 U. S. 443, 452, this Court said:

> **It is elementary also that the power conferred by Section 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location.**

See also *Swanson* v. *Kettler, supra.*

Section 37 did not except from the operation of the Leasing Act *lands* upon which valid claims existed at the date of its passage, but only valid *claims* then existing and thereafter maintained. It clearly contemplates that if the requirement of maintenance was not fulfilled, the land within the claim should become subject to the operation of the Leasing Act. As heretofore stated by the Department of the Interior in the *Cronberg case, supra,* the Leasing Act operated as a continuing withdrawal.

Unless the claim is saved by Section 37, the Leasing Act automatically withdrew the land from disposition under the mining law. But we think it is plain that the words "thereafter maintained in compliance with the laws under which initiated" refer primarily to the continued performance of assessment work required by such laws for each and every statutory period. That was the only exaction the mining law had prescribed to maintain a claim. Moreover, the frequency with which "maintained" or equivalent expressions, "kept up," "kept alive," "preserved," are encountered in the decisions of this Court (see *Gwillim* v. *Donnellan,* 115 U. S. 45,

48; *Cole* v. *Ralph, supra,* 295; *El Paso Brick Co.* v. *McKnight,* 233 U. S. 250, 256; *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349) in referring to the necessity of the annual assessment work, gave it a well-understood meaning. When a legislative body selects and uses in a statute words or clauses which had acquired by judicial interpretation or common consent and use a well-understood meaning, the legal presumption is they should have that meaning and effect in the statute enacted. *Thorn* v. *Browne,* 257 Fed. 519, 523, and cases there cited.

But, although the Leasing Act continued the obligation to perform annual assessment work required by Section 2324, it does not follow that under the changes brought about by that Act in withdrawing from the operation of the mining law certain minerals, it was intended to continue privileges conferred under Section 2324, particularly so where the perpetuation of such privileges would have the effect of enlarging the rights of claimants under the former law.

The Leasing Act manifests no purpose to confer upon existing claimants under the mining law any greater rights against the Government than they had before against rival claimants. As we have seen, the claimants of a valid claim were protected so long as they complied with the condition of performing the prescribed annual labor, but if they defaulted their claim was subject to appropriation by others. Also, in advance of discovery an ex-

plorer in actual occupancy and in diligent search for mineral on the public domain, was protected from forcible, fraudulent, and clandestine invasions of his possession, but if he relaxed his occupation, or if it was but incidental to something else than the diligent search for mineral, another could enter peaceably but not fraudulently and clandestinely, and make a discovery and valid location. *Cole* v. *Ralph, supra,* p. 295, and cases there cited.

Both classes of claims were regarded as substantial and entitled to protection. It was the latter class of claims which Congress sought to protect when the words "including discovery" were added to the saving clause of Section 37, as the Congressional debates on the leasing bill show. 58 Cong. Rec., pt. 5, pp. 4577–4585, 66th Cong., 1st Sess. Similar protection had been extended to like claimants theretofore on oil-placer claims, in the Act of June 25, 1910, 36 Stat. 847, to protect them from withdrawals made under said Act.

The theory that the right to resume work under Section 2324 is perpetuated by the Leasing Act as to the mineral deposits mentioned in the latter, is opposed to the policy and purpose of the Act.

First, it would take away the penalty of forfeiture by relocation imposed in the same section to counterbalance the privilege of resumption. The practical effect of the recognition that such privilege continues, is to render the estate of the locator terminable only at his will and pleasure no matter how negligent the claimant had been in developing

the land. He could hold the claim against any seeker of rights and grantees under the Leasing Act and against the Government itself, except upon establishment that the claim had been abandoned. Lapse of time, absence from the ground, or failure to work the claim for any definite period, unaccompanied by other circumstances, are not evidences of abandonment. Lindley on Mines (3d Ed.), Vol. 2, p. 1603, and cases there cited.

Second, if the Leasing Act intended that no new rights could be initiated by relocation, it necessarily follows that it did not intend that any lapsed rights should be reinstated. When the land became unsegregated public mineral land by the default of the original locator, Section 2324 did not invest him with any superior right to the land over strangers who might seek to acquire it under the mining law. Section 2324 merely created a race for priority of reentry for the purpose of development. The better right of resumptioner over the relocator depended on whether the former sufficiently resumed before the latter sufficiently relocated, the courts not being in entire accord as to what constitutes sufficiency in the one case or the other, the question being affected by legislation in many States. See cases cited in Lindley on Mines, Section 408, pp. 952–958, and Section 652, pp. 1633–1639; U. S. C. A., Title 30, section 28, notes 377, 379, pp. 211, 212. The only advantage the prior locator had over the relocator was that he could dispense with the initial acts of location. The lat-

ter could adopt the previous discovery of the prior locator. *McMillen* v. *Ferrum Mining Co.*, 197 U. S. 343, 347; *Nevada-Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. 673, 677; *Hayes* v. *Lavagnino*, 17 Utah 185; *Jupiter Mining Co.* v. *Bodie Consolidated Mining Co.*, 11 Fed. 666, 676. And when the estate of the prior locator became extinguished by his failure to comply with the law, the relocator on entry and perfection of his relocation had dominion and control over the property and his appropriation carried the right to the betterments and improvements of the prior locator when they were of the class designated as fixtures. Lindley on Mines, *supra*, Section 409, pp. 958, 959. The statement in *Hodgson* v. *Midwest Oil Co.*, *supra* (p. 77) that "Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate" is justly open to criticism for its inept phrasing, for, as above stated, the prior locator was not obliged to relocate his claim. But the principle therein embodied is sound and is a valid inference from the decisions therein cited, that upon the happening of the default in assessment work, the defaulting locator stands upon an equal footing with any other person qualified to locate as to the right to acquire the exclusive possessory right to the claim, the mode of acquirement merely being different as to him.

Third, to hold that the right to resume work was preserved by the Leasing Act would render its proper administration with respect to lands known to be valuable for oil shale deposits difficult if not impossible. If there can be doubt under the statutes under consideration as to whether right of resumption remains, the inconveniences which such a construction will occasion are proper elements to consider. *Knowlton* v. *Moore,* 178 U. S. 41, 77, and cases there cited.

If the test of validity is not compliance with law, but the existence of an intent to atone for the delinquency, then the status of oil shale lands, whether segregated by mineral location or subject to disposition under the Leasing Act, is thrown into confusion and uncertainty. Extensive search of local land records would be necessary, as the Land Department would have to find and have established whether any location made prior to the Leasing Act had been abandoned. The duty would be imposed to ascertain the whereabouts of many locators or their successors in interest, serve them with process, give them their day in court, and establish that they intended to abandon the claim. Without such preliminaries brought to a successful conclusion, a lessee under a Federal lease for such lands would have no assurance as to the validity of his title or the security of his possession, except from the operation of the rules of estoppel or adverse possession. The construction of the Court of Appeals places the idle, the delinquent, and the neg-

ligent upon the same plane of security and merit as the diligent and law-abiding.

No overt act or judicial inquiry was necessary, after claimants were in default, to terminate their rights. Upon the occurrence of the default, the estate of the locator lapsed and was reunited with the public domain. The locators at no time had either legal or equitable title to the land. Section 37 afforded notice to all such mining claimants of the conditions under which they could maintain their possessory right, and such conditions being broken, the right failed by operation of law. This Court has in several cases maintained the doctrine that an actual entry or office found is not necessary to enable the Government to take advantage of a condition broken, and to resume the possession of lands that have been forfeited. It was so held in *United States* v. *Repentigny*, 5 Wall 211; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Farnsworth* v. *Minnesota & Pacific Railroad Company*, 92 U. S. 49; *McMicken* v. *United States*, 97 U. S. 204, 217, 218.

Respondent's contention that some overt act by the Government should take place evincing an intent to repossess the land or that some judicial proceeding should be initiated before work was resumed is predicated upon the fallacious premise that the right of resumption of work after default remained after the Leasing Act, and that the Government, therefore, must act the part of a relocator, and get in before the locator gets back.

The entry and improvements made after the default by the respondent in an effort to qualify him to obtain a patent were made in violation of law. He could gain no rights thereby. He, therefore, could set up no equities against the Government by reason thereof. *Deffeback* v. *Hawke,* 115 U. S. 392, 407; *Sparks* v. *Pierce,* 115 U. S. 408, 413.

At page 2 of respondent's brief in opposition to the petition for writ of certiorari, statements are made to the effect that work was performed for the claim but was ineffective, because done in the wrong place. Such statements challenge the conclusions of fact found by the Secretary; his decisions which were made part of respondent's petition for the writ of mandamus, speak for themselves. The Secretary found there was no intent to perform work or make improvements for this claim in 1920. (R. 17, 20.)

Respondent's claim existing on February 25, 1920, was not "thereafter maintained in compliance with the laws," in that respondent defaulted in the performance of the work required by such laws for the year 1920. The passage quoted from *Work* v. *Braffet, supra,* p. 16, defines comprehensively the character of claims that are embraced in the saving clause of Section 37. It is submitted the claim of the respondent is not of the character there described.

CONCLUSION

The Secretary had jurisdiction to determine whether the Spad No. 3 placer claim was of the character embraced in the saving clause of Section 37, and his decision was right; the judgment of the Court of Appeals should be reversed.

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